Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

WALTER GEORGE,

Petitioner,

v.

NATIONAL ASSOCIATION OF LETTER CARRIERS, AND ITS LOCAL BRANCH #1037,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

BRIAN J. SERR
Counsel of Record
1400 S. 5th St.
Waco, Texas 76798
(254) 710-3611
(254) 710-2817 (fax)

GREG WHITE
MCGREGOR & WHITE
116 North 25th Street
Waco, Texas 76710
(254) 756-4427
(254) 756-4429 (fax)

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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QUESTIONS PRESENTED

I. Whether the First Amendment protects the secondary boycott activities of labor unions, no matter how coercive and improperly motivated those activities are, so long as the labor union does not engage in picketing; and, consequently, whether § 8(b)(4) of the NLRA, which expressly prohibits labor unions from engaging in coercive secondary boycotts, must be interpreted as a *per se* rule that prohibits only those boycotts that involve picketing?

II. Whether coercive union tactics that reasonably threaten a "one product" secondary employer with economic ruin are controlled by this Court's decision in *Safeco* (which ruled that secondary tactics that are normally protected become unlawfully coercive when they reasonably threaten a "one product" secondary with economic ruin) or instead are controlled by this Court's decision in *DeBartolo* (which held only that handbilling persons approaching a shopping mall is not sufficiently coercive to run afoul of § 8(b)(4))?

III. Whether the line between those secondary activities that are "protected" by the First Amendment and those that are prohibited by § 8(b)(4) should be drawn in a way that effectively accords labor unions a privilege, superior to that enjoyed by any other individual or entity, to engage in improperly motivated and economically coercive activities that would otherwise constitute tortious interference with business relationships under state law?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 1

STATEMENT OF THE CASE 2

(a) Statement of Facts 2

(b) Course of Proceedings and Dispositions 4

REASONS FOR GRANTING THE WRIT 6

I. The Fifth Circuit's Sharp Distinction Between Picketing and Other Forms of Coercive Secondary Activity Conflicts with the Plain Language of § 8(b)(4) of the NLRA, Conflicts with this Court's Totality of Economic Circumstances Approach to Distinguishing Those Secondary Boycotts Having Some Legitimate Claim to First Amendment Protection From Those That are Illegally Coercive and Restraining in Violation of § 8(b)(4), and Further Conflicts with Other Circuits' Interpretations of § 8(b)(4) 6

A. Conflict with Plain Language of § 8(b)(4) ... 6

B. Conflict with Supreme Court Precedent ... 7

C. Conflict with Other Circuits 11

TABLE OF CONTENTS – Continued

Page

II. The Fifth Circuit's Erroneous Determination That This Case is Ultimately Controlled by This Court's Decision in *DeBartolo* Rather Than This Court's Decision in *Safeco*, Which is Much More Directly on Point, Stems From a Fundamental Misconstruction of *DeBartolo* That Renders *Safeco* a Virtual Nullity 13

III. The Fifth Circuit's Misconstruction of § 8(b)(4), Caused by its Erroneous Interpretation of *DeBartolo*, Upsets the Balance Congress Intended to Strike Between Labor and Management 17

IV. The Fifth Circuit's Treatment of The Texas Tort Claim As Coextensive With Its *Per Se* Approach to the § 8(b)(4) Claim Raises Significant Federalism Concerns by Effectively According First Amendment Protection to Conduct Traditionally Regarded as Tortious Under State Law 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Brown & Root, Inc. v. Louisiana State AFL-CIO, 10 F.3d 316 (5th Cir. 1994) 13

Cohen v. Cowles Media Co., 501 U.S. 663 (1991) 19

DeBartolo v. Fla. Gulf Coast Trades Council, 485 U.S. 568 (1988) ..... *passim*

Employment Div., Oregon Dept. of Human Resources v. Smith, 494 U.S. 872 (1990) 19

George v. National Association of Letter Carriers, 185 F.3d 380 (5th Cir. 1999) ..... *passim*

Gottfried v. Sheet Metal Workers' Local No. 80, 876 F.2d 1245 (6th Cir. 1989) 12

International Union Local 150 v. NLRB, 47 F.3d 218 (7th Cir. 1995) 12

Limbach Co. v. Sheet Metal Workers International Association, 949 F.2d 1241 (3rd Cir. 1991) (en banc) 11

Local 25, A/W International Brotherhood of Teamsters v. NLRB, 831 F.2d 1149 (1st Cir. 1987) 12

Local 761 v. NLRB, 366 U.S. 667 (1961) 14

NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760 ("Tree Fruits"), 377 U.S. 58 (1964) .... *passim*

NLRB v. International Brotherhood of Electrical Workers, 405 F.2d 159 (9th Cir. 1968) 11

NLRB v. Retail Store Employees Union, Local 1001 ("Safeco"), 447 U.S. 607 (1980) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Pye v. Teamsters Local Union No. 122, 61 F.3d 1013 (1st Cir. 1995) 11, 15

Sheet Metal Workers, Local Union No. 91 v. NLRB, 905 F.2d 417 (D.C. Cir. 1990) 11

CONSTITUTION AND STATUTES

U.S. CONST., AMENDMENT I ..... *passim*

29 U.S.C. § 158(b)(4)(ii)(B) or § 8(b)(4) ..... *passim*

29 U.S.C. § 185 4

29 U.S.C. § 187 4

PETITION FOR WRIT OF CERTIORARI

Petitioner, Walter George, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeal for the Fifth Circuit is reported at 185 F.3d 380 (5th Cir. 1999). *See* Appendix, at 1. The Fifth Circuit order denying George's Motion for Rehearing, dated September 7, 1999, is unreported. *See* App. 28. The opinion of the United States District Court for the Western District of Texas (R. 830-846) is unreported.

JURISDICTION

The judgment of the Fifth Circuit was entered on August 16, 1999. The Fifth Circuit's order denying both panel rehearing and en banc rehearing was entered on September 7, 1999. This Court has jurisdiction to review the judgment of the Fifth Circuit under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the First Amendment to the United States Constitution. It also involves Section 8(b)(4)

of the National Labor Relations Act. 29 U.S.C. § 158(b)(4). The texts of these provisions appear at App. 30.

STATEMENT OF THE CASE

(a) Statement of Facts – Walter George, the plaintiff in this action, retired from the United States Postal Service in November, 1992, after almost thirty years of service, including thirteen as a supervisor. (R.722, 748). In October 1993, Mr. George started working for Brookfield Uniforms, selling postal uniforms to postal employees in the Midland (TX.) area. (R.720-721). George also occasionally worked in other regions as an independent contractor for the United States Postal Service, inspecting letter carriers' routes and otherwise looking for ways to increase efficiency. (R.722-729). During February to April of 1996, the Postal Service contracted with Mr. George to inspect Amarillo's Jordan Station. (R.730). In mid-April, George received a telephone call from Phil Hampton, the Brookfield area manager, informing George that letter carriers in Amarillo were upset that someone from Brookfield was on the Postal Service's inspection team. (R.737). Not only were the letter carriers upset that the Postal Service subjected them to the inspection, (R.758-759), they were also upset that George had identified poor working habits, sloppiness, and inefficiency during that inspection. (R.733-736). Mr. George later received a telephone call from Hampton in June, 1996, complaining that letter carriers were "raising Cain" about George's contract work for the Postal Service, and were calling a union meeting about it. (R.739). Hampton indicated that, due to

his fear of a possible union boycott of Brookfield Uniforms, he planned to attend that meeting and would let George know the outcome. (R.739, 742). After attending the union meeting, Hampton telephoned Mr. George and left the following message on George's answering machine:

> "Listen, I met with the people up here in Amarillo, and in order to prevent a boycott of Brookfield Uniforms [that would] basically put us out of business, we are going to have to terminate our relationship with you as an independent sales representative. . . . [It's] something we've just got to do." (R.740-742).

In a subsequent conversation, Hampton explained that his motive for terminating George was the same as had been earlier reported over the telephone:

> "The labor union said, 'If you don't get rid of him, we are going to boycott Brookfield Uniforms.' We've got the National Convention coming in. I can't afford for a boycott to go up. You know, I was caught in the middle, but the bottom line of it is just like I told you, I don't have a problem with what you did other than somebody raised hell about it." (R.771).

Hampton further reported that the union formally voted to boycott Brookfield: "There was not one person that voted against it." (R.778). Hampton also explained that the union agreed to overturn the boycott pursuant to a three step solution. First, Hampton was required to terminate George. (R.776). Second, the union would "reconsider" the boycott of Brookfield Uniforms; they would "put it on the floor and overturn it." (R.776). Third, the union would move to expunge the boycott from their

records, to alleviate Hampton's fear that the minutes of the union meetings (including the Local's vote to boycott Brookfield) would be mailed out in a newsletter:

> "If that letter goes out all over the United States, then next month they are going to have to put something in there to take it out. It's going to be too late. You know, it is like you said, I got caught between a rock and a hard place." (R.776-777).

Even the president of the Amarillo Local confirmed this threat to boycott Brookfield during his deposition. (R. 756).

(b) Course of Proceedings and Dispositions – Walter George filed this lawsuit in the Western District of Texas, Midland Division, alleging that the Amarillo Local's boycott of Brookfield Uniforms constituted an unfair labor practice under § 8(b)(4)(ii)(B) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4)(ii)(B), and further alleging that the boycott amounted to a tortious interference with business relationships under Texas law. George also sued the *national* association (the "NALC") on the ground that it had both authorized and ratified the unlawful secondary activities of its local branch. George's federal cause of action against the local union was grounded on 29 U.S.C. § 187, which provides a cause of action to anyone injured in their business by a labor union's unfair labor practices; and his cause of action against the NALC was additionally grounded on 29 U.S.C. § 185(b), which provides that a labor organization's liability turns on common law agency principles. Federal jurisdiction over this lawsuit was premised on 28 U.S.C. §§ 1331 and 1367, and 29 U.S.C. §§ 158 and 187. The District Court granted the

Defendants' Motions for Summary Judgment, finding that the union activity, despite its coerciveness, was protected by the First Amendment.[1] The Fifth Circuit affirmed, finding that the union's secondary boycott fell outside the scope of § 8(b)(4), despite its coerciveness and its overtly retaliatory motive, essentially because the boycott did not include picketing and therefore constituted activity protected by the First Amendment. *See* 185 F.3d at 389-91; App. 19-23. The Fifth Circuit denied George's Motion for Rehearing on September 7, 1999.

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[1] With respect to the NALC (*i.e.*, the *national* organization), the District Court alternatively based its grant of summary judgment on the ground that plaintiff had not established a genuine issue of material fact supporting the NALC's responsibility, under agency principles, for the activities of its local branch. In doing so, the District Court weighed evidence, resolved conflicting evidence against the plaintiff, and drew inferences that a jury would not have to draw, all in contravention of its role on summary judgment. Nevertheless, the Fifth Circuit based its affirmance entirely on its resolution of the "§ 8(b)(4)/First Amendment" issue and did not address the issue of the NALC's responsibility, under traditional agency principles, for the conduct of its local branch. Consequently, this Petition seeks review only of the Fifth Circuit's stance on the "§ 8(b)(4)/First Amendment" issue, which erects a barrier to George's recovery against both the NALC *and* its Local Branch #1037.

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit's Sharp Distinction Between Picketing and Other Forms of Coercive Secondary Activity Conflicts with the Plain Language of § 8(b)(4) of the NLRA, Conflicts with this Court's Totality of Economic Circumstances Approach to Distinguishing Those Secondary Boycotts Having Some Legitimate Claim to First Amendment Protection From Those That are Illegally Coercive and Restraining in Violation of § 8(b)(4), and Further Conflicts with Other Circuits' Interpretations of § 8(b)(4).

A. *Conflict with Plain Language of § 8(b)(4)* – While a union can use concerted economic pressure against its primary employer to influence the outcome of a labor-management dispute, federal law restricts a union's ability to aim that pressure elsewhere, at those so-called secondary employers who are not party to a primary labor dispute. Thus, § 8(b)(4)(ii)(B) of the National Labor Relations Act proscribes, as an unfair labor practice, a secondary boycott enforced by coercion, threats, or restraint, when the purpose of the boycott is to force a secondary employer to cease doing business with another. 29 U.S.C. § 158(b)(4)(ii)(B). Though the union's secondary tactics in this case fit squarely within the plain language of § 8(b)(4)'s prohibition, the Fifth Circuit has effectively amended the statute to prohibit economic coercion, threats, and restraint *only when picketing is involved*. *See* 185 F.3d at 389-91; App. 19-23. Although there is a proviso to § 8(b)(4) that draws an express distinction between picketing and other forms of "publicity," that proviso expressly applies only to union activity that is *aimed at a product distributed by the primary employer*, and that *does not interfere with the relationship between the*

secondary and its employees. *See* 29 U.S.C. § 158(b)(4)(ii)(B). Because the proviso is so clearly inapplicable to this case, even the *defendants* have never relied on it. Yet, it appears prominently in the Fifth Circuit's opinion. *See* 185 F.3d at 388-89; App. 17-19. If anything, the narrow proviso demonstrates that Congress knew how to target only picketing when it so desired. The presence of the "no picketing" proviso, which by its very terms applies only in an express subset of those situations covered by § 8(b)(4)'s basic rule, stands in marked contrast to Congress' basic description of the unfair labor practice as "coercion, threats, or restraint." Thus, in light of the proviso, it is untenable that Congress meant for its basic prohibition of unfair secondary tactics to foreclose only picketing.

B. *Conflict with Supreme Court Precedent* – The Fifth Circuit supports its picketing/nonpicketing distinction with several phrases from *DeBartolo v. Fla. Gulf Coast Trades Council*, 485 U.S. 568 (1988), phrases not only taken wholly out of the factual context of that case, but wholly out of the overall context of this Court's § 8(b)(4) jurisprudence. *See* 185 F.3d at 389-90; App. 20-22. Indeed, a whole line of Supreme Court authority, leading up to and including *DeBartolo*, reveals that the scope of secondary activities proscribed by § 8(b)(4) – even those that may have some ballpark claim to First Amendment value – is not determined by overly rigid *per se* rules such as one that would draw a bright line between secondary union activity that includes picketing and secondary union activity that does not. Rather, the cases turn on an assessment of the *degree* of collective economic pressure brought to bear on secondary employers (or others not

party to a primary labor dispute) and whether that pressure truly qualifies as "coercive" or "threatening." *See, e.g., "Tree Fruits,"* 377 U.S. at 68 ("the prohibition of § 8(b)(4) is keyed to the coercive nature of the conduct *whether it be picketing or otherwise*") (emphasis added) (quoted, in Fifth Circuit's opinion, 185 F.3d at 385; App. 9, but apparently without an appreciation that it directly contradicts the Fifth Circuit's ultimate conclusion).

That there is nothing talismanic in the presence or absence of picketing – and that § 8(b)(4) focuses instead on the degree of economic pressure exerted by the particular secondary tactic, whatever its label – is evident in the diversity of results in the picketing cases themselves. Sometimes secondary picketing "coerces" secondary employers in contravention of § 8(b)(4), and sometimes it does not. *Compare NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760 ("Tree Fruits")*, 377 U.S. 58 (1964) (secondary picketing *not* "coercive") *with NLRB v. Retail Store Employees Union, Local 1001 ("Safeco")*, 447 U.S. 607 (1980) (secondary picketing "coercive"). In *Tree Fruits*, the Court declined to read § 8(b)(4) as a prohibition of all peaceful secondary picketing because of concerns that such a broad prohibition would collide with the First Amendment. 377 U.S. at 63. The Court instead drew a distinction between peaceful secondary tactics aimed only at a struck product and tactics aimed more generally at the secondary employer itself. *Id.*, at 63-64. Thus, because the secondary boycott in *Tree Fruits* was aimed only at the product of the primary employer (apples) and not more generally at the secondary employers (selected grocery stores), the Court held it to be outside § 8(b)(4)'s prohibition. *Id.*, at 64.

In *Safeco*, this Court demonstrated that even its *Tree Fruits* distinction is not an absolute *per se* rule. 447 U.S. at 613-15. Although *Tree Fruits* declared product picketing to be lawful activity in order to avoid a collision between § 8(b)(4) and the First Amendment, the Court in *Safeco* nevertheless ruled that even activity that is usually protected becomes unlawful under § 8(b)(4) when the economic threat faced by secondary employers becomes sufficiently severe. *See id.* In *Safeco*, the union was on strike against Safeco Title Insurance Company and picketed not only Safeco's home office, but also at five small title companies that derived over 90% of their gross income from the sale of Safeco insurance. *Id.*, at 609. Because the targeted secondaries were predominately "one product secondary sites," successful product picketing would have put those neutral secondary employers to a choice between their survival and the severance of their existing business ties with Safeco, labor's primary target. *Id.*, at 615. Thus, the Court concluded that otherwise lawful secondary appeals to the consumer (such as product picketing) simply do not square with the language or purpose of § 8(b)(4)(ii)(B) when such tactics "reasonably can be expected to threaten neutral parties with ruin or substantial loss." *Id.*, at 614-15.

Just as *Safeco* established that *Tree Fruits* did not announce a *per se* rule protecting all product picketing, *DeBartolo* later established that *Tree Fruits* did not announce a *per se* rule prohibiting all "total" boycotts. 485 U.S. 568 (1988). *DeBartolo* involved a total secondary boycott of a shopping mall that was "total" in the sense that *Tree Fruits* used the word, since the handbills asked consumers to completely refrain from all business in the mall. *Id.*, at 570-71. The Court in *DeBartolo* ruled that this

was not the type of "total boycott" prohibited by § 8(b)(4), not simply because the means used consisted of traditional First Amendment activity (so did the product picketing in *Safeco*), but because (unlike *Safeco*) the total secondary boycott solicited in *DeBartolo* was devoid of any reasonable likelihood of success and was therefore neither threatening nor coercive. *Id.*, at 578-80. Therefore, when the Court in *DeBartolo* distinguished *Safeco*, at 580 ("the picketing there actually threatened the neutral with ruin or substantial loss"), the basis of the distinction turned less on the absence in *DeBartolo* of picketing than on the absence in *DeBartolo* of any substantial degree of economic pressure.[2] In short, when viewed in light of *Tree Fruits* and *Safeco*, it is clear that *DeBartolo* drew a line, not arbitrarily between picketing and all other types of secondary tactics, but rather between pressure-packed secondary activity that truly "threatens," "coerces," or

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[2] To accept the Fifth Circuit's view that the key to *DeBartolo* was the absence of picketing, one would also have to accept that, had the union in that case placed one or two pickets outside the mall with placards asking the public to do the very same thing as the handbills, the union activity would have instantly become so threatening to the mall owner (hardly a "one-product secondary" like in *Safeco*) that it would have been prohibited. But a fair reading of *Tree Fruits*, *Safeco*, and *DeBartolo* demonstrates that the Court's analysis of secondary tactics is neither that formulaic nor that arbitrary.

If there is any "picketing distinction" in *DeBartolo*, it is simply that picketing is more likely on average to coerce *consumers* to stop doing business with the secondary, a situation that would also fall within § 8(b)(4)'s prohibition. It is important to realize, however, that § 8(b)(4) is aimed also at union efforts to coerce and threaten *secondary employers*; the coercion of the secondary's *customers*, though an alternative basis of § 8(b)(4) illegality, is not a requirement of § 8(b)(4).

"restrains," and punchless secondary activity of the type involved in *DeBartolo*, which plainly never attained the capacity to "threaten," "coerce," or "restrain" anyone.

C. *Conflict with Other Circuits* – No circuit other than the Fifth has ever held that secondary boycotts, no matter how economically coercive or restraining, must be regarded as falling outside § 8(b)(4)'s prohibition so long as the union's secondary activity does not involve picketing. Instead of straining to reduce § 8(b)(4) to arbitrary *per se* rules, other circuits have adopted an approach that, like this Court's precedent, ultimately focuses on the degree of economic pressure exerted on a secondary employer by concerted union activity. *See, e.g., Sheet Metal Workers, Local Union No. 91 v. NLRB*, 905 F.2d 417, 424 (D.C. Cir. 1990) (interpreting § 8(b)(4)(ii) to prohibit "any form of economic pressure of a compelling or restraining nature," and holding the union's secondary activity, which did not involve picketing, to be unlawfully "coercive"); *Limbach Co. v. Sheet Metal Workers International Association*, 949 F.2d 1241, 1256-57 (3rd Cir. 1991) (en banc) (interpreting § 8(b)(4)'s prohibition of secondary "coercion" to include "a strike, picketing, *or other economic retaliation or pressure*," and holding that the union's secondary activities, which did not involve picketing, could properly be found unlawfully coercive) (emphasis in original); *NLRB v. International Brotherhood of Electrical Workers*, 405 F.2d 159, 161-62 (9th Cir. 1968) (ruling that § 8(b)(4)'s prohibition is not limited to strikes and picketing; rather, the key is the coercive nature of the conduct); *Pye v. Teamsters Local Union No. 122*, 61 F.3d 1013, 1023 (1st Cir. 1995) (recognizing the speciousness of the union's First Amendment claim in a nonpicketing case

where, like the present case, the secondary activity was unrelated to publicity in any meaningful sense); *Local 25, A/W International Brotherhood of Teamsters v. NLRB*, 831 F.2d 1149, 1153 (1st Cir. 1987) (interpreting § 8(b)(4) as "pragmatic in its application," looking to the "coercive nature of the conduct" not to the label which it bears); *Gottfried v. Sheet Metal Workers' Local No. 80*, 876 F.2d 1245, 1250-51 & n.1 (6th Cir. 1989) (explaining that the application of "economic retaliation or pressure in the background of a labor dispute" is to "coerce" within the meaning of § 8(b)(4), and holding that the challenged secondary activity, which did not involve picketing, would run afoul of § 8(b)(4) if done "for the purpose of applying economic coercion to achieve a prohibited secondary objective"); *International Union Local 150 v. NLRB*, 47 F.3d 218, 223 (7th Cir. 1995) (choosing not to adopt a *per se* rule in a case where the secondary activity consisted of picketing, instead ruling that union conduct violates § 8(b)(4) "if any object of that activity is to exert improper influence on secondary or neutral employers," which is to be determined by an examination of "the totality of [the] union's conduct in [the] given situation"). Thus, the Fifth Circuit's *per se* "anything but picketing" analysis of § 8(b)(4)'s prohibition creates a clear split in the circuits.

Moreover, the Fifth Circuit's ruling in the present case conflicts even with precedent in its own Circuit. In a case decided after the *Tree Fruits/Safeco/DeBartolo* line of cases, the Fifth Circuit squarely acknowledged that the scope of § 8(b)(4)'s prohibition of coercive secondary tactics depends on an assessment of the actual *degree* of economic pressure inflicted on the secondary employer

rather than a set of arbitrary *per se* rules focused on the *type* of tactics used. Thus, in *Brown & Root, Inc. v. Louisiana State AFL-CIO*, 10 F.3d 316, 320 (5th Cir. 1994), a case that notably involved a *DeBartolo* issue, the Fifth Circuit explained that Congress' use of the word "coerce" was intended to reach any form of economic pressure of a compelling or restraining nature. According to *Brown & Root*, the word "coerce" in § 8(b)(4)(ii) "means no more than non-judicial acts of a compelling or restraining nature, applied by way of concerted self-help consisting of a *strike, picketing, or other economic retaliation or pressure* in the background of a labor dispute." *Id.*, at 320 (emphasis added).

II. The Fifth Circuit's Erroneous Determination That This Case is Ultimately Controlled by This Court's Decision in *DeBartolo* Rather Than This Court's Decision in *Safeco*, Which is Much More Directly on Point, Stems From a Fundamental Misconstruction of *DeBartolo* That Renders *Safeco* a Virtual Nullity.

The absence of picketing in *DeBartolo* was significant for two reasons, both of which relate directly to § 8(b)(4)'s prohibition of secondary activities that "threaten, coerce, or restrain." First, unlike a picket line, peaceful handbilling is unlikely to intimidate members of the consuming public. *See* 485 U.S. at 578-80. Second, because handbilling is not very coercive, it is not very effective; consequently, the handbilling is unlikely to coerce or restrain secondary employers such as the shopping mall in *DeBartolo*. *Id.*, at 580. Moreover, even if the handbilling proves effective, and sufficient members of the general public

stop doing business with the secondary employer, any "coercion" felt by the secondary has been proximately caused by a series of individual decisions made by individual members of the general consuming public, and is not attributable solely to the concerted activity of the union. *See id.*

Thus, *DeBartolo* in no way stands for the proposition that a secondary employer's *consumers* must suffer the coercion inherent in a picket line before a labor union may be deemed to have coerced the secondary employer in violation of § 8(b)(4). *Direct* coercion of secondary employers falls as squarely within § 8(b)(4)'s prohibition as *indirect* coercion. Indeed, the primary purpose of § 8(b)(4) was to protect secondary employers, such as Brookfield Uniforms, from economic coercion and restraint, whether accomplished *in*directly by coercing the secondary's customers or more directly by going straight for the secondary's throat. *See Local 761 v. NLRB*, 366 U.S. 667, 672 (1961). The present case involves the more direct form of coercion – a threat made directly to Phil Hampton of Brookfield Uniforms. As Hampton recognized, the local union's threat to boycott Brookfield, and its intent to take steps that inevitably would have expanded the geographic scope of that boycott, constituted a viable threat to destroy Brookfield. (R. 740-742). Both Hampton and Steve Swaim, the president of the local union, indicated that Hampton essentially had "no choice" but to fire Mr. George. (R. 771, 776-777, 756). That is "coercion." That is "restraint." And it was directed at the secondary employer with the precise purpose proscribed by § 8(b)(4) – the intent to force Brookfield Uniforms to stop doing business with another.

The facts of this case demonstrate the fallacy of reading *DeBartolo* to require coercion of a secondary's consumers before union activity can be regarded as illegally coercing a secondary employer. In this case, the effectiveness of the secondary boycott and its attendant capacity to coerce or restrain Brookfield did not depend at all on persuading individual members of the public over whom the union held no special sway. Indeed, the primary consumers of Brookfield's only product *were* members of the letter carriers union, a fact which the defendants have never disputed. This is important for several reasons. First, the Brookfield boycott had the capacity to directly coerce Brookfield, and in no way depended on "taking to the streets" and persuading independent-minded members of the general consuming public. Thus, the Brookfield boycott had what the shopping mall boycott in *DeBartolo* lacked – a big economic club with which to coerce the secondary employer. Second, the absence of any union need to take its viewpoint to the public, and its consequent "publicizing" of its secondary boycott only to one member of the public who was not a union brother – Phil Hampton of Brookfield Uniforms – shows how tenuous a claim its tactics have to First Amendment protection. *See Pye v. Teamsters Local Union No. 122*, 61 F.3d 1013, 1023 (1st Cir. 1995) (recognizing the tenuous nature of a union's First Amendment claim when its secondary activity was unrelated to publicity in any meaningful sense). Internal discussion of improperly motivated coercive tactics, and the subsequent concerted agreement to pursue those coercive tactics, is more "conspiracy" than it is "publicity." And though an improperly motivated "conspiracy" to do harmful things always involves "speech" in one form or another, that hardly brings it into the

realm of activity that the First Amendment insulates from liability.[3]

Yet, even if the secondary activity in the present case has some ballpark claim to First Amendment value, the Supreme Court in *Safeco* held that such activities lose their protected status and become unlawfully coercive when aimed at "one product" secondary employers in a way that reasonably threatens ruin or substantial loss. 447 U.S. at 614-15. That is precisely the situation in the present case. Indeed, the union boycott of Brookfield was far more "coercive" and "threatening" than that involved in *Safeco* because, not only is Brookfield a "one product" secondary, it is virtually a "one consumer" secondary, because members of the letter carriers' union constitute a substantial majority of those who consume Brookfield's product. (*See* R.741, 771).[4] Thus, the Brookfield boycott

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[3] Unlike *DeBartolo*, the union engaged in no handbilling or any other expressive activity designed to inform the public about its dispute with the Postal Service over Mr. George's inspection. Complaining to taxpayers that the Postal Service was inspecting letter carriers' routes in order to eliminate inefficiency and sloth is hardly the type of cause (such as the union complaint in *DeBartolo* that a contractor was paying substandard wages) on which unions genuinely expect to win public support. The absence of any legitimate union beef with its primary employer also explains why the union chose naked retaliation against an inspector instead of negotiations with the Postal Service about the inspections.

[4] Of course, had the letter carriers refused to buy Brookfield uniforms for about any reason other than their disenchantment with their primary employer's inspections (and inspectors) – *e.g.*, because they were unhappy with Brookfield's product – then its dispute would be neither "secondary" nor even a "labor" dispute. Consequently, § 8(b)(4) would not apply.

had a much greater chance of coercing reluctant assistance from the secondary employer than the *Safeco* boycott, because the letter carriers' union needed the cooperation only of its own union brothers in order to bring Brookfield to its knees and thereby force Brookfield to fire Mr. George.

Although the facts of this case bring it much more in line with the unlawful *Safeco* boycott than the lawful *DeBartolo* boycott, the Fifth Circuit never adequately explained why it found *DeBartolo* rather than *Safeco* to be ultimately controlling. Indeed, by taking the position that any nonpicketing secondary activity is protected under *DeBartolo*, even when that activity threatens to put a "one product" secondary employer out of business, the Fifth Circuit has not only misconstrued *DeBartolo*, but has rendered *Safeco* a virtual nullity. Under the Fifth Circuit's view, secondary activity consists either of unlawful picketing or activity protected under *DeBartolo*. *See* 185 F.3d at 389-90; App. 19-22. There is no middle ground. Without a more exacting analysis, *Safeco's* protection of "one product" secondary sites will quickly become illusory in the face of union secondary strategies that avoid picketing but nevertheless possess the capacity to threaten, coerce, and restrain.

III. The Fifth Circuit's Misconstruction of § 8(b)(4), Caused by its Erroneous Interpretation of *DeBartolo*, Upsets the Balance Congress Intended to Strike Between Labor and Management.

While the union in the present case targeted only a secondary employer and one of its employees for economic harm, the Fifth Circuit's "anything but picketing"

approach to § 8(b)(4) surely will be relied on by labor unions in future disputes with management. So long as unions avoid picketing, they can apply restraining economic pressure against companies that are "secondary" to union disputes with their primary employer, profit from any resulting economic advantage gained over the primary, and be secure in the knowledge that their activity, however coercive or restraining, is constitutionally protected.

IV. The Fifth Circuit's Treatment of The Texas Tort Claim As Coextensive With Its *Per Se* Approach to the § 8(b)(4) Claim Raises Significant Federalism Concerns by Effectively According First Amendment Protection to Conduct Traditionally Regarded as Tortious Under State Law.

There is a critical difference between 1) holding that the First Amendment shelters (from any form of liability) *the particular union activity involved in this case;* and 2) holding that § 8(b)(4) should be read more narrowly than its plain language *in order to avoid First Amendment concerns over the run of cases, regardless of the First Amendment significance, if any, of the union conduct in the present case.* If the former, then the First Amendment would clearly insulate the union from liability no matter what the label of the cause of action, whether "unfair labor practice" or "tortious interference." However, if the latter is the holding, then the tortious interference claim survives as a separate cause of action, since the narrowness of a federal definition of wrongful conduct in no way mandates any particular state interpretation of the breadth of its wholly unique cause of action. That is, the tortious interference

claim survives at least until some court expressly holds that the *particular* union activity in the present case is shielded from liability by the First Amendment.

Honestly, it is not clear (to us at least) which form the Fifth Circuit's opinion takes. Of course, if it truly was the Fifth Circuit's intent to specifically hold the particular union conduct at issue to be affirmatively sheltered by the First Amendment, it is important to recognize that no court has *ever* accorded individuals First Amendment insulation from generally applicable laws just because their illegal behavior involved elements of speech, or religion, or news gathering. *See, e.g., Cohen v. Cowles Media Co.*, 501 U.S. 663, 669-70 (1991); *Employment Div., Oregon Dept. of Human Resources v. Smith*, 494 U.S. 872, 878-79 (1990). Thus, either the Fifth Circuit has erroneously accorded labor unions greater First Amendment rights than individuals (or other groups) possess – in which case labor unions have some superior privilege to engage in retaliatory intrusions into the business and contractual relationships of private citizens – or, the Fifth Circuit's narrow construction of § 8(b)(4) to avoid First Amendment concerns over the run of cases cannot properly be regarded as automatically undermining the plaintiff's "tortious interference" claim in the present case. Either way, the Fifth Circuit's treatment of the plaintiff's state tort law claim raises substantial federalism concerns.

CONCLUSION

For the foregoing reasons, petitioner respectfully urges the Court to grant a Writ of Certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

BRIAN J. SERR
Counsel of Record
1400 S. 5th St.
Waco, Texas 76798
(254) 710-3611
(254) 710-2817 (fax)

GREG WHITE
MCGREGOR & WHITE
116 North 25th Street
Waco, Texas 76710
(254) 756-4427
(254) 756-4429 (fax)

Dated: December 2, 1999

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-50335

WALTER GEORGE,

Plaintiff-Appellant,

versus

NATIONAL ASSOCIATION OF
LETTER CARRIERS; LOCAL BRANCH #1037,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas

(Filed Aug. 16, 1999)

Before GARWOOD, BARKSDALE and BENAVIDES, Circuit Judges.

GARWOOD, Circuit Judge:

Plaintiff-appellant Walter George (George) sued defendants-appellees National Association of Letter Carriers (NALC) and its Local Branch No. 1037 (the local) for alleged unfair labor practices and tortious interference with contract. The district court granted summary judgment in favor of the defendants-appellees. We affirm.

Facts and Proceedings Below

In November 1992, George retired from a twenty-seven-year career in the United States Postal Service. In May 1993, George began performing consultant services for the Postal Service on a contractual basis. George evaluated letter carriers' work habits, monitored delivery routes, and sought ways to increase efficiency. In October 1993, George also began working as an independent sales representative for Brookfield Uniforms (Brookfield), a company licensed by the Postal Service to sell uniforms to letter carriers. George was compensated on a commission basis. His relationship with Brookfield had no stated or implied term. George sold uniforms to letter carriers in the Midland-Odessa, Texas, region.

George contracted with the Postal Service to inspect its Amarillo Jordan station between February and April, 1996. The Jordan station is outside the region in which George sold uniforms. The letter carriers at the Jordan station were represented in collective bargaining by NALC. Many were members of the local.

Pursuant to an arrangement with the Postal Service, George took a week's absence from the Jordan station to fulfill his responsibilities for Brookfield. After inquiring about George's absence, some Jordan letter carriers learned that George was a Brookfield salesman. This news upset the letter carriers. George had determined that some Jordan letter carriers had poor work habits, and had reported observations of "sloppiness" and "sloth" to the Postal Service. The letter carriers argue that they were upset by George's "dual life": on one hand

harassing the Jordan letter carriers as a management figure, while on the other posing as a friend to the letter carriers in Midland-Odessa and profiting by selling uniforms to them.

George's so-called "dual life" became a topic of discussion at the local's next few meetings. After the local's April 1996 meeting, local representative Dianna Williams (Williams) contacted Brookfield's area manager Phil Hampton (Hampton) to confirm that George was a Brookfield sales representative and to discuss what the Jordan letter carriers perceived to be a conflict of interest. Hampton subsequently telephoned George and informed him of the conversation with Williams. Hampton asked George whether he intended to return to the Jordan station. George answered that he likely did not. Hampton asked George to sign a letter stating that he would not go back to the Jordan station, but George refused. An undetermined time later, Hampton relayed this information to Williams.

When George later returned to the Jordan station, the letter carriers were upset. At its June 11, 1996, meeting, the local passed a motion to write letters to the NALC locals in the Midland-Odessa area in which George sold uniforms, asking their members not to buy uniforms from Brookfield. After the meeting, Williams phoned Hampton and advised him of the motion. Hampton asked whether he could do anything to remedy the situation. Williams invited Hampton to come to Amarillo.

Hampton feared a boycott. Although the NALC bylaws do not require local chapters to follow other locals' boycotts, Hampton realized that it is common

practice among labor unions to do so. Sales in the Midland-Odessa region would suffer. More importantly, although the local did not threaten to contact any NALC locals other than those in the Midland-Odessa region, Hampton feared that the boycott would spread. Hampton knew that the minutes for a given meeting of the local were normally prepared after that meeting and approved at the next meeting and that the local regularly published the thus-approved minutes of its meetings in a newsletter which it distributed to NALC locals nationwide. Hampton feared that other NALC locals might read about the local's June 11 motion and also withhold patronage from Brookfield. Furthermore, the NALC's national convention was approaching. Hampton feared that news of the local's request would spread through word-of-mouth, and that the boycott might thus spread as well.

Hampton left a message on George's answering machine stating that he was going to Amarillo to speak with the letter carriers, and that they had been discussing a possible boycott. On June 18, Hampton struck a deal with some members of the local. These members insisted that Hampton fire George. In exchange, the local would retract the June 11 motion and expunge all discussion of the motion from its minutes. When he returned from Amarillo, Hampton left a message on George's answering machine, stating that in order to prevent a boycott, Brookfield was terminating its relationship with George.

George alleges that the local's proposed letter writing constituted an unfair labor practice under section 8(b)(4) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(b)(4)(ii)(B). George sued the local and NALC under 29 U.S.C. § 187(b), which provides a private cause

of action to any person injured in business or property by a violation of section 8(b)(4)(ii)(B). George also sued both the local and NALC for tortious interference with contract under Texas law. The district court granted summary judgment for defendants-appellees. We affirm.

Discussion

This Court reviews the grant of summary judgment *de novo*, applying the same standards as the district court. *Merritt-Campbell, Inc. v. RxP Products, Inc.*, 164 F.3d 957, 961 (5th Cir. 1999). Summary judgment is proper only where, viewing the evidence in the light most favorable to the nonmoving party, the court determines that there is no genuine issue of material fact and judgment is proper as a matter of law. *Id.*; Fed. R. Civ. P. 56(c).

I. Section 8(b)(4)(ii)(B)

Section 8(b)(4)(ii)(B) of the National Labor Relations Act, as amended, makes it an unfair labor practice for a labor organization or its agents to "threaten, coerce, or restrain" any person engaged in commerce or in an industry affecting commerce where an object thereof is "forcing or requiring any person to," among other things, "cease doing business with any other person." 28 U.S.C. § 158(b)(4)(ii)(B).[1] The statute was enacted to prohibit

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[1] "It shall be an unfair labor practice for a labor organization or its agents

. . .

to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is

certain secondary boycotts. Described as "one of the most effective weapons in labor's economic arsenal," a secondary boycott generally involves a labor union's exertion of pressure on a neutral employer with whom the union has no dispute, in order to force that neutral employer to stop dealing with the primary employer with whom the union does have a labor dispute. *See* 2 *The Developing Labor Law* 1211 (Patrick Hardin *et al.*, eds., 3d ed. 1992). One of Congress' primary aims in prohibiting certain secondary boycotts was " 'shielding . . . unoffending employers and others from pressures in controversies not their own.' " *See Edward J. DeBartolo Corp. v. N.L.R.B.*, 103 S.Ct. 2926, 2932 (1983) (*DeBartolo I*) (quoting *NLRB v. Denver Building and Construction Trades Council*, 71 S.Ct. 943, 953 (1951)). However, section 8(b)(4) does not expressly use the term secondary boycott, nor does it prohibit all secondary boycott activity by labor unions. *See N.L.R.B. v. Fruit and Vegetable Packers and Warehousemen*, 84 S.Ct. 1063 (1964) (*Tree Fruits*). *Cf. Local 1976, United Brotherhood of Carpenters and Joiners of America v. N.L.R.B.*, 78 S.Ct. 1011, 1015 (1958) ("[Section 8(b)(4)(A)] does not speak generally of secondary boycotts. It describes and condemns specific union conduct directed to specific objectives."). Section 8(b)(4)(ii)(B) prohibits only the use of threats, coercion, or restraint for the purpose, *inter alia*, of forcing any person engaged in commerce to cease doing business with any other person.

. . .

forcing or requiring any person . . . to cease doing business with any other person. . . . "

George argues that the local threatened, coerced, or restrained Hampton and Brookfield by threatening to boycott Brookfield if Hampton did not terminate George, and that as a result Brookfield, through Hampton, did terminate its relationship with George. Even accepting as true, as we must for purposes of summary judgment, that in light of the local's demands Hampton felt he had no economically reasonable choice but to terminate George,[2] we conclude that the local did not threaten, coerce, or restrain Hampton within the meaning of section 8(b)(4)(ii)(B).

A. Threats, Coercion, or Restraint

The Supreme Court examined the meaning of threats, coercion, and restraint under section 8(b)(4)(ii)(B) in *Tree Fruits*. In that case, a labor union struck several firms of fruit packers and warehousemen that sold Washington State apples to Safeway grocery stores. *See Tree Fruits*, 84 S.Ct. at 1064. In support of the strike, the union fostered a consumer boycott against the apples. Union picketers walked back and forth, wore placards, and distributed handbills in front of customer entrances to Safeway stores in the Seattle, Washington, area. The handbills asked customers not to purchase the apples. Both the placards and the handbills clearly noted that the picketing was directed against the apples and their packers only. *See id.*

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[2] As George's relationship with Brookfield was entirely indefinite as to duration, having no stated or implied term, Brookfield was legally free to terminate it at will and at any time. *See Trient Partners v. Blockbuster Entertainment*, 83 F.3d 704, 708 (5th Cir. 1996).

at 1065 n.3. The union had no dispute with Safeway, and did not ask consumers to cease doing business with Safeway. *See id.* at 1065.

The union was charged with violating section 8(b)(4), and the case was submitted to the National Labor Relations Board (Board). The Board held that section 8(b)(4)(ii)(B) prohibited all secondary consumer picketing at secondary sites. *See id.* at 1066. Section 8(b)(4) contains a proviso which states, in pertinent part,

> "That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer. . . . "

Because the proviso excludes picketing, the Board inferred that all consumer picketing must be coercive. *See id.* at 1065-1066. The Court of Appeals for the District of Columbia Circuit reversed, holding that a showing of threats, coercion, or restraint required a finding that Safeway would suffer a substantial economic impact as a result of the boycott. *See id.* at 1066. After reviewing the legislative history and intent of section 8(b)(4), the Supreme Court rejected both interpretations and held that the statute simply did not prohibit the union's conduct.

The Court observed that both congressional policy and the Court's interpretive principles "reflect concern that a broad ban against peaceful picketing might collide

with the guarantees of the First Amendment." *Id.* Respectful of this tension between labor regulation and free speech, "Congress has consistently refused to prohibit peaceful picketing except where it is used as a means to achieve specific ends which experience has shown are undesirable." *Id.* In other words, Congress has prohibited picketing only when used to advance specific wrongful ends, or "isolated evils." *See id. Cf. also Hardin et al., supra,* at 1215 (identifying prohibited conduct and prohibited object under earlier version of the statute). Recognizing this policy of legislating only against isolated evils, the Court would not infer a legislative intent to ban picketing absent " 'the clearest indication in the legislative history' [citation] that Congress intended to do so as regards the particular ends of the picketing under review." *Tree Fruits,* 84 S.Ct. at 1066 (citation omitted).

Congress did not intend section 8(b)(4) to prohibit all consumer picketing. In contrast to section 8(b)(4), which requires a showing that the union has acted to threaten, coerce, or restrain, section 8(b)(7) explicitly bans all picketing. *See Tree Fruits,* 84 S.Ct. at 1069. ("When Congress meant to bar picketing *per se,* it made its meaning clear. . . . In contrast, the prohibition of § 8(b)(4) is keyed to the coercive nature of the conduct, whether it be picketing or otherwise."). *Id.*

Congress enacted section 8(b)(4)(ii)(B) specifically to prohibit picketing used to cut off a secondary employer's business, in order to force the secondary employer to cease doing business with the primary employer. *See id.* When a union pickets in order to shut off the business of a secondary employer, the union expands its dispute with the primary employer, and seeks to involve the secondary

employer in its primary dispute. *See id.* at 1067. Furthermore, when the union asks customers to cease patronizing a secondary employer, the union creates an additional, separate dispute with that secondary employer. *Id.* at 1071 (footnote omitted).

The picketing in *Tree Fruits*, however, targeted only the struck apples. The union did not ask consumers to cease all shopping at Safeway, and made no effort to cut off Safeway's business generally. The dispute merely followed the struck product, and although the picketing moved to the secondary employer's premises, the dispute did not expand to engulf the secondary employer. *See id.* at 1066. The picketing outside Safeway did not have the proscribed object of cutting off the secondary employer's business generally, and therefore was not the "isolated evil" prohibited by section 8(b)(4).

The Court held that the proviso's exclusion of picketing did not necessarily indicate that all picketing is coercive. *See id.* at 1070 ("[I]t does not follow from the fact that some coercive conduct was protected by the proviso, that the exception 'other than picketing' indicates that Congress had determined that all consumer picketing was coercive."). Moreover, the Court expressly rejected the Court of Appeals' holding that the relevant inquiry was whether the picketing caused economic harm to the secondary employer. Where the legislative history lacked a clear intent to ban the sort of picketing conducted, "a violation of § 8(b)(4)(ii)(B) would not be established, merely because respondents' picketing was effective to reduce Safeway's sales of Washington State apples, even if this led or might lead Safeway to drop the item as a poor seller." *See id.* at 1071.

The Court concluded that Congress did not intend to ban all picketing by section 8(b)(4), but was instead "following its usual practice of legislating against peaceful picketing only to curb 'isolated evils.' " *Id.* at 1070. Because the union limited its dispute to the struck product and did not ask consumers to cease doing business generally at Safeway, the single-product picketing was not the "isolated evil" which the statute prohibited.[3]

However, single product consumer picketing did violate section 8(b)(4)(ii)(B) where that picketing "predictably encourage[d] consumers to boycott a neutral party's business." *See National Labor Relations Board v. Retail Store Employers Union,* 100 S.Ct. 2372, 2374 (1980) (*Safeco*). Safeco Title Insurance Company maintained close business relationships with five title companies. At the time the labor dispute arose, over ninety percent of each of these companies' income was derived from sales of Safeco insurance policies. *Safeco,* 100 S.Ct. at 2375. When the union struck Safeco, the union fostered a consumer boycott against Safeco policies and picketed in front of the title companies. The union picketers at the title companies carried signs announcing their dispute with Safeco

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[3] Justice Douglass did not participate in the consideration or decision of the case. In a concurring opinion, Justice Black agreed with the dissent's analysis that the boycott violated the statute. However, differing with the dissent, Justice Black concluded that the statute placed a content-based restriction on speech and thus violated the First Amendment. Justice Harlan, joined by Justice Stewart, dissented. Justice Harlan concluded that the statute prohibited all secondary consumer picketing, and did not distinguish between picketing aimed at a single product and picketing aimed at a boycott of the neutral employer altogether.

and distributed handbills asking consumers to cancel their Safeco policies. Because Safeco policies constituted over ninety percent of the title companies' businesses, the picketing was "reasonably calculated to induce customers not to patronize the neutral parties at all." *Id.* at 2377 (internal quotation marks, citation, and footnote omitted.). The Court therefore held that the picketing violated section 8(b)(4)(ii)(B).

The *Safeco* Court distinguished *Tree Fruits* because the insurance policies constituted such a large share of the business of each of the title companies. If the single product picketing in *Tree Fruits* were successful, the grocery store might only lose profits from the sale of the Washington State apples. The marginal effect on the store would be "purely incidental to the product boycott." *Id.* However, where the struck product constituted almost the entirety of the secondary retailers' businesses, there was little difference between a boycott of the targeted product and a boycott of the secondary retailers altogether. *See id.* "Since successful secondary picketing would put the title companies to a choice between their survival and the severance of their ties with Safeco," the picketing violated section 8(b)(4). *Id.* at 2377-78.

A four-justice plurality of the *Safeco* Court held that, because Congress may prohibit picketing in furtherance of unlawful objectives, the application of section 8(b)(4) to the facts of that case did not violate the First Amendment. *See id.* at 2378. Departing on this point, Justice Blackmun and Justice Stevens each issued concurring

opinions which augmented the plurality's brief discussion of First Amendment concerns.[4] Justice Brennan, joined by Justices White and Marshall, dissented.[5]

The *DeBartolo* case arose out of a dispute between a union and the H.J. High Construction Company (High), which employed nonunion workers. DeBartolo owned and operated a shopping mall which leased space to store owners. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council,* 108 S.Ct. 1392, 1395 (1988) (*DeBartolo II*). H.J. Wilson Company (Wilson), a tenant of DeBartolo's, had retained High to construct its new department store at the mall. Neither DeBartolo nor

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[4] Justice Blackmun held that Congress had lawfully struck a "delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife." *Id.* at 2379 (Blackmun, J., concurring). Justice Stevens concluded that the statute was constitutional based on the fact that picketing was not pure speech, and that in the labor context, "the conduct element" of picketing provided a more effective deterrent to the neutral's customers than did the speech itself. *See id.* at 2379-80 (Stevens, J., concurring). Justice Stevens also noted that " 'the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence those aspects of picketing make it the subject of restrictive regulation' " (quoting Justice Douglas's concurring opinion in *Bakery Drivers v. Wohl,* 62 S.Ct. 816, 819-20 (1942)). *Id.* at 2379-80.

[5] The dissent disagreed that the threat of economic harm defined whether the boycott was permissible. Instead, the dissent would have followed *Tree Fruits* and continued to hold that the statute distinguished only between boycotts aimed at single products and those aimed at secondary employers altogether. *See Safeco,* 100 S.Ct. at 2380-2382 (Brennan, J., dissenting).

any of the mall's some eighty-five other tenants had a legal right to control whom Wilson hired to construct its store. The union had no dispute with Wilson, DeBartolo, or any other mall tenant.

Outside each of the mall's four entrances, the union distributed handbills stating that Wilson's store was being built by contractors receiving substandard wages and that "[t]he payment of substandard wages not only diminishes the working person's ability to purchase with earned, rather than borrowed, dollars, but it also undercuts the wage standard of the entire community." *See id.* at 1395 n.1. The handbills asked consumers to withhold all business from the mall until DeBartolo publicly promised that all construction performed at the mall would meet union standards. The union's message was limited to the handbills. No pickets or patrols were set up. *Id.* at 1395 ("the union peacefully distributed the handbills without any accompanying picketing or patrolling"), 1398 ("no picketing or patrolling was involved"), and 1399 ("There was no violence, picketing, or patrolling, and only an attempt to persuade customers not to shop in the mall").

DeBartolo advised the union that he would not object to the handbilling if the union would clarify that its dispute was limited to the Wilson construction and did not involve DeBartolo or any other mall tenant, and if the union would limit its handbilling to the area surrounding Wilson's store. When the union refused, DeBartolo filed a complaint with the Board, alleging that the handbilling violated section 8(b)(4). *See id.* at 1395.

Initially, the Board held that the union's actions were protected by the proviso. *See id.* The Supreme Court reversed that decision, holding that the proviso did not apply to the mall tenants (other than Wilson) because the tenants were not distributors of any product produced by the employer with whom the union had the primary dispute (High). *See id.* at 1396; *DeBartolo I,* 103 S.Ct. at 2932-33. Because the Board had not determined whether, absent the proviso, the statute prohibited the handbilling, the Court remanded the case. *Id.*

On remand, the Board concluded that handbilling urging a consumer boycott constituted coercion, and violated section 8(b)(4)(ii)(B). *See DeBartolo II,* 108 S.Ct. at 1396. The Eleventh Circuit refused to enforce the Board's order. Because the Board's interpretation of the statute raised significant constitutional questions, the Court of Appeals refused to hold that section 8(b)(4)(ii) banned mere consumer handbilling in the absence of clear legislative intent to do so. Further, the Court of Appeals held that the proviso was merely an explanatory section and did not create an exception to an otherwise broad ban on non-picketing publicity. *See id.* at 1397.

The Supreme Court agreed, relying on the rule that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Id.* (citing *National Labor Relations Board v. Catholic Bishop of Chicago,* 99 S.Ct. 1313, 1318-1319 (1979)). The Court noted in this connection that

> "the Board's construction of the statute, as applied in this case, poses serious questions . . . under the First Amendment. The handbills involved here truthfully revealed the existence of a labor dispute and urged potential customers of the mall to follow a wholly legal course of action, namely, not to patronize the retailers doing business in the mall. The handbilling was peaceful. No picketing or patrolling was involved." *Id.* at 1398.

It went on to observe that "[w]e do not suggest that communications by labor unions are never of the commercial speech variety and thereby entitled to a lesser degree of constitutional protection," but further noted that "[t]he handbills involved here, however, do not appear to be typical commercial speech" and that in any event "commercial speech itself is protected by the First Amendment" and thus "however these handbills are to be classified, the Court of Appeals was plainly correct in holding that the Board's construction would require deciding serious constitutional issues." *Id.*

The Court then stated its conclusion that section 8(b)(4)(ii)(B) "is open to a construction that obviates deciding whether a congressional prohibition of handbilling on the facts of this case would violate the First Amendment." *De Bartolo II,* 108 S.Ct. at 1399. It reasoned that the words "threaten, coerce, or restrain" of section 8(b)(4)(ii) do not limit themselves to a reading so broad as to include peaceful handbilling. *Id.* Whereas section 8(b)(4)(ii) prohibits threats, coercion, or restraint in the pursuit of certain ends, section 8(b)(4)(i) prohibits any labor organization "to induce or encourage" any person employed by a secondary employer to strike or refuse to

work. The words "to threaten, coerce, or restrain" therefore require more than mere persuasion. *Id.* In *DeBartolo II*, however, the union had done no more than attempt to induce or encourage mall customers to support its boycott. *See id.* ("There was no violence, picketing, or patrolling and only an attempt to persuade customers not to shop in the mall."). Such acts did not amount to coercion or restraint under the statute. Furthermore, *Tree Fruits* foreclosed the possibility that all consumer appeals having adverse economic impact on the neutral party constitute coercion within section 8(b)(4)(ii)(B). *See id.* at 1400.

The Court found no clear indication in the legislative history of section 8(b)(4)(ii)(B) that Congress intended to ban peaceful handbilling of a secondary employer, unaccompanied by picketing. *See id.* at 1402. The legislative proponents of section 8(b)(4)(ii)(B) were chiefly concerned with the problem of secondary boycotts carried out by picketing. *See id.* The legislative history reflected no intent to ban handbilling or other nonpicketing appeals such as newspaper or radio ads. *See id.*

The Court again rejected the argument that the proviso created an exception to an otherwise broad ban of publicizing labor disputes at secondary sites. "It may indicate only that without the proviso, the particular nonpicketing communication the proviso protects might have been considered to be coercive, even if other forms of publicity would not be." *Id.* at 1401. "Section 8(b)(4), with its proviso, may thus be read as not covering nonpicketing publicity" at all. *Id.*

This view was reinforced by a summary analysis of the House-Senate Conference compromise bill, which

ultimately resulted in section 8(b)(4)(ii)(B). *See id.* at 1403 ("§ 8(b)(4)(ii)(B) was one of the amendments agreed upon by a House-Senate Conference on the House's Landrum-Griffin bill and the Senate's Kennedy-Ervin bill"). The analysis stated that "the House provision prohibiting secondary consumer picketing was adopted but 'with clarification that other forms of publicity are not prohibited.' " *Id.* (citations and footnote omitted). "The clarification referred to was the [proviso]." *Id.*

Senator Kennedy, chairman of the Conference Committee, reported that the Senate conferees were not able to persuade House conferees to allow picketing in front of secondary sites. However, the Senate conferees "were able to persuade them to agree that the union shall be free to conduct informational activity short of picketing." *Id.* (quoting 105 Cong. Rec. 17898-17899, 2 Leg. Hist. 1432). Senator Kennedy assured the Senate that a " 'union can hand out handbills at the shop, can place advertisements in newspapers, can make announcements over the radio, and can carry on *all publicity short of having ambulatory picketing in front of a secondary site.*' " *DeBartolo II,* 108 S.Ct. at 1403-04 (emphasis added) (quoting 105 Cong. Rec. 17898-17899, 2 Leg. Hist. 1431-1432).

Furthermore, Senator Kennedy stated that the Committee's bill would not prohibit publicity urging consumers to buy American-made items, commonly known as buy-American campaigns. Because buy-American campaigns do not typically involve any primary dispute, such publicity would not fall under the proviso. If the proviso were merely an exception to a ban on advertising at secondary sites, buy-American campaigns would have been prohibited. *Id.* at 1404.

The Court found no clear indication that Congress intended section 8(b)(4)(ii)(B) to proscribe handbilling unaccompanied by picketing. *See id.* The *DeBartolo II* Court concluded that section 8(b)(4)(ii)(B) simply does not extend to prohibit non-picketing publicity.[6]

B. Picketing vs. Nonpicketing Publicity

George argues that the true measure of "threats, coercion, or restraint" is the threat of economic consequences. George argues that to threaten, coerce, or restrain means to take any action which leaves a secondary employer believing he has no choice but to acquiesce or suffer substantial economic harm. The distinction between picketing and nonpicketing activity, George argues, is merely superficial.

The possibility of economic ramifications, however, does not transform otherwise lawful conduct into "threats, coercion, or restraint" under the statute. While the Court did evaluate the economic realities of the boycott in *Safeco*, that consideration was limited to the inquiry of whether the *picketing* was in fact the "isolated evil" which the statute proscribed. The Court did not, as George's argument implies, examine Safeco's economic predicament without first finding (at least potentially) prohibited conduct.

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[6] Justice O'Connor and Justice Scalia concurred in the judgment, but did not issue separate opinions. Justice Kennedy took no part in the consideration of the case. *See id.* at 1404.

Under George's theory, any form of publicity, such as the proposed letter-writing or even an aggressive advertising campaign, would constitute "coercion, threats, or restraint" if it effectively persuaded consumers not to patronize a secondary employer. There is no evidence that Congress intended such a result, and, more importantly, *DeBartolo II* forecloses the possibility of this interpretation of section 8(b)(4)(ii). *See Storer Communications, Inc. v. National Association of Broadcast Employees and Technicians*, 854 F.2d 144, 147 (6th Cir. 1988) ("The Supreme Court [in *DeBartolo II*] held that peaceful handbilling does not constitute coercive, threatening, or restraining activity in violation of Section 8(b)(4)(ii)(B), even when the handbilling urges a total consumer boycott of neutral secondary businesses.") (citing *DeBartolo II*, 108 S.Ct. at 1404).

The distinction between picketing and nonpicketing is not, as George argues, a mere formality. In *DeBartolo II*, the Court distinguished at length the coercive nature of picketing, separate from its speech elements, from peaceful handbilling. In fact, the Court expressly distinguished picketing from other forms of speech no less than ten times: (1.) Distinguishing the boycott in *Safeco*, the Court noted that "picketing is qualitatively different from other modes of communication." *Id.* at 1400 (internal quotation marks and citations omitted). (2.) Similarly, where the *Tree Fruits* Court had noted that consumer boycotts can in certain circumstances be coercion under section 8(b)(4), the *DeBartolo II* Court limited that discussion to the context of picketing. *See DeBartolo II*, 108 S.Ct. at 1400 n.4. ("The Board points out that Tree Fruits indicates urging customer boycotts can be coercion within the meaning of

§ 8(b)(4). [Citations]. But the Court was there talking about picketing and not mere handbilling.") (citations omitted). (3.) Unlike handbilling, which merely promotes written ideas, "[p]icketing is 'a mixture of conduct and communication' and the conduct element 'often provides the most persuasive deterrent to third persons about to enter a business establishment.' " *Id.* at 1400 (quoting *Safeco*, 100 S.Ct. at 2379 (Stevens, J., concurring)). (4.) Although the distribution of written messages such as "circulars" may convey the same information, "the very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication." *Id.* at 1400 (quoting *Hughes v. Superior Court*, 70 S.Ct. 718, 721 (1950)).[7]

(5.) "There is even less reason [than in *Tree Fruits*] to find in the language of § 8(b)(4)(ii)(B), standing alone any clear indication that handbilling, without picketing, 'coerces' secondary employers. The loss of customers because they read a handbill urging them not to patronize a business, and not because they are intimidated by a line of picketers, is the result of mere persuasion." *Id. See also, e.g.*, (6.) *id.* at 1401 ("Section 8(b)(4), with its proviso, may thus be read as not covering nonpicketing publicity. . . . "); (7.) *id.* at 1402 n.6 ("Consumer picketing against the distributor of a struck manufacturer's product

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[7] *See also Bakery & Pastry Drivers Local 802 v. Wohl*, 62 S.Ct. 816 (1942) (Douglass, J., concurring) ("Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated.").

was the paradigm case considered in the debates."); (8.) *id.* at 1402 ("Neither do we find any clear indication in the relevant legislative history that Congress intended § 8(b)(4)(ii)(B) to proscribe peaceful handbilling, unaccompanied by picketing. . . . "); (9.) *id.* ("[A]mong the concerns of the proponents of the provision barring threats, coercion, or restraints aimed at secondary employers was consumer boycotts of neutral employers carried out by picketing. At no time did they suggest that merely handbilling the customers was one of the evils at which their proposal was aimed."); (10.) *id.* at 1400 n.3 ("The absence of picketing in the present case distinguishes it from *Honolulu Typographical" Union v. NLRB,* 401 F.2d 952 (D.C. Cir. 1968)).

It is thus clear that *DeBartolo II* turned on the conclusion that handbilling, where unaccompanied by picketing or patrolling, was not coercive, threatening, or restraining, within the meaning of section 8(b)(4)(ii), and that it was only the absence of picketing or patrolling which distinguished *DeBartolo II* from *Safeco.* In *DeBartolo II,* the union was requesting a total boycott of the mall and its shops, but nothing in the Court's opinion indicates whether or not this posed a significant risk of serious economic harm to the mall or the shops there and the opinion does not evaluate or consider that risk. *DeBartolo II* is thus clearly inconsistent with George's analysis.

Moreover, since *DeBartolo II,* the Board has drawn a clear distinction between picketing and nonpicketing publicity at secondary sites. *See NLRB v. United Ass'n of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada,* 302 NLRB 919, 1991 WL 150567 (N.L.R.B.), (*Ramada*) (citing *Service*

Employees Local 399 (Delta Air Lines), 293 NLRB 602 (1989), and *Steelworkers (Pet, Inc.)*, 288 NLRB 1190 (1988)). In these cases, "the Board emphasized, as the Supreme Court had in DeBartolo, the absence of violence, picketing, and patrolling attendant to the handbilling and other publicity, and found instead that the unions merely had attempted to persuade customers not to patronize the neutral employers. That persuasion was found not to be coercive." *Ramada*, 302 NLRB at 920 (internal footnote omitted).

Ramada had hired a general contractor, which in turn hired a nonunion subcontractor. The union's business manager wrote a letter to Ramada's president and chairman of the board, objecting to the use of the nonunion subcontractor and threatening to organize labor support for a boycott against Ramada Inns as well as to distribute handbills advertising the dispute to potential customers. The letter closed with the ominous warning: "It looks like the beginning of a full scale war with the Ramada Inn as the battlefield." *Id.* at 919.

The administrative law judge held that the union had violated section 8(b)(4)(ii)(B). The administrative law judge found that a boycott by the union's affiliated labor groups would pressure Ramada into rescinding its contract with the general contractor. Furthermore, the administrative law judge held that "the unqualified pugnaciousness" of the letter distinguished the handbilling from that in *DeBartolo*.

The Board disagreed, and held that the union's proposed conduct did not violate section 8(b)(4)(ii)(B). The mere attempt to persuade customers not to patronize a

particular establishment, unaccompanied by violence, picketing, or patrolling, is not coercion under section 8(b)(4)(ii). Because the threatened conduct was not coercive, the union's threat to engage in that conduct did not violate the statute. *See id.* ("The statutory protection for the distribution of handbills would be undermined if a threat to engage in protected conduct were not itself protected.") (quoting *NLRB v. Servette,* 84 S.Ct. 1098, 1105 (1964) (footnote omitted)).[8]

The local's conduct here was no more coercive than the pugnacious behavior of the union in *Ramada.* The local never mentioned picketing, patrolling, or any other coercive, threatening, or restraining conduct. The local threatened only to write another NALC local urging its members not to patronize Brookfield. This action simply is not coercive, threatening, or restraining behavior under section 8(b)(4)(ii)(B). We note that in *DeBartolo II* the Court rejected any construction of section 8(b)(4)(ii) under which "it would be an unfair labor practice for unions in their own meetings to urge their members not to shop in the mall." *Id.*, 108 S.Ct. at 1402. And, we agree with the Board's conclusion in *Ramada* that a labor organization's purely communicative effort to persuade members of a fellow labor organization to join them in a boycott does not violate section 8(b)(4)(ii)(B).[9] Moreover,

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[8] *See also BE & K Construction Co. v. United Brotherhood of Carpenters,* 90 F.3d 1318, 1330-31 (quoting same passage of *Servette*), 1328 ("threats or warnings that a union will engage in protected conduct such as handbilling . . . are not a violation of federal law") (8th Cir. 1996).

[9] George relies on our decision in *Brown & Root, Inc. v. Louisiana State AFL-CIO,* 10 F.3d 316 (5th Cir. 1994). However,

letter writing – which is what the local proposed here – has even fewer potentially coercive, threatening, or restraining characteristics than does even handbilling or other in-person communication, and has been held, albeit in other contexts, to enjoy correspondingly greater First Amendment protection. *See, e.g., Shapero v. Kentucky Bar Ass'n*, 108 S.Ct. 1916, 1922-23 (1988).

We hold that the district court correctly granted summary judgment that the local did not violate 8(b)(4)(ii)(B).[10]

II. Tortious Interference

George also sued the local and NALC for tortious interference with contractual relations under Texas law. *See Texas Beef Cattle Co. v. Green*, 921 S.W.2d 203, 210 (Tex. 1996). The elements of tortious interference with contract under Texas law are: "(1) the existence of a contract subject to interference; (2) a willful and intentional act of interference; (3) the act was a proximate cause of the plaintiff's damages; and (4) actual damage or loss." *Id.* (citation omitted). However, Texas law also provides the

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we there held, in reliance on *DeBartolo II*, that the union's First Amendment protected activity did not violate section 8(b)(4)(ii)(B). *See id.* at 325-27. Nothing in our holding there supports George's section 8(b)(4)(ii) claim.

[10] We recognize that this case does not present a typical secondary boycott because the local has no dispute with its primary employer, the Postal Service. However, in *International Longshoremen's Association v. Allied International, Inc.*, 102 S.Ct. 1656 (1982), the Court held that the prohibitions contained in section 8(b)(4) apply even in the absence of a primary dispute.

affirmative defense of justification to interference torts where the interfering party acts in a *bona fide* exercise of a legal right. *Id.*

George concedes in his brief to this Court that "if the union's secondary boycott falls outside the scope of § 8(b)(4) because of First Amendment concerns, the boycott would also enjoy a defense under Texas law."[11] As noted, the scope of section 8(b)(4)(ii) has been narrowly construed, in major part, precisely because of First Amendment concerns. Since George has not taken the position on appeal that the local may have violated Texas tort law even if the local's actions were not proscribed by section 8(b)(4)(ii), we do not examine that issue today. For the same reason, we do not address whether federal labor

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[11] This portion of George's brief responds to appellees' claim made below and reiterated on appeal that federal labor law preempts George's Texas law tortious interference claim. The passage from George's brief quoted in the text is part of the following argument, *viz*:

> "The district court did not decide this issue, but it is apparent that plaintiff's state law claim of tortious interference neither conflicts with federal labor law nor frustrates federal labor policy. There is no actual conflict because Texas law provides a defense to liability for tortious interference if the defendant is justifiably exercising a legal right. *Texas Beef Cattle Co. v. Green*, 921 S.W.2d 203, 211 (Tex. 1996). Thus, if the union's secondary boycott falls outside the scope of § 8(b)(4) because of First Amendment concerns, the boycott would also enjoy a defense under Texas law."

Apart from his contention that it is not preempted, George's brief contains no argument that his Texas tortious interference claim would be viable if the local's conduct was not proscribed by section 8(b)(4)(ii).

law preempts a state law interference with a contractual relations claim.

III. NALC Liability

Finally, as we affirm the district court's dismissal of George's claims against the local on the foregoing bases, and as George seeks to hold NALC liable only on the theory that the local was its agent or it ratified the local's actions, we likewise affirm the dismissal of George's claims against NALC and do not reach the issues of agency or ratification.

Conclusion

For the reasons stated, the judgment of the district court is

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-50335

WALTER GEORGE

Plaintiff – Appellant

v.

NATIONAL ASSOCIATION OF LETTER CARRIERS;
LOCAL BRANCH #1037

Defendants – Appellees

Appeal from the United States District Court for the
Western District of Texas, Midland

ON PETITION FOR REHEARING EN BANC

(Filed Sep. 7, 1999)

(Opinion 8/16/99, 5 Cir., ___, ___ F.3d ___)

Before GARWOOD, BARKSDALE and BENAVIDES, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Will Garwood
United States Circuit Judge

REHG-6a

Constitutional And Statutory Provisions Involved

U.S. Const., Amendment I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

29 U.S.C. § 158. Unfair labor practices (in pertinent part)

(a) Unfair labor practices by employer

* * *

(b) Unfair labor practices by labor organization

It shall be an unfair labor practice for a labor organization or its agents –

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some

ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is –

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title; *Provided*, That

nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work;

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter;

Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such

publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

* * *

29 U.S.C. § 187. Unlawful activities or conduct; right to sue; jurisdiction; limitations; damages

(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title.

(b) Whoever shall be injured in his business or property by reason [of] any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.